



Town of Lexington
Town Clerk's Office

Nathalie L. Rice, Town Clerk

Tel: (781) 698-4558

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TOWN BULLETIN

RE: Office of the Attorney General – Approval of General Bylaw Amendment and Zoning Bylaw Amendment, 2020-2 October Special Town Meeting, *after extension, Articles 5 and 9.*

DATE: June 14, 2021

Notification has been received from the Office of the Attorney General, dated June 11, 2021 of the approval of Articles 5 and 9 to the General and Zoning Bylaws respectively, as voted at the 2020-2 October Special Town meeting.

Special Town Meeting 2020-2, October 14, 2020

General Bylaw:

Article 5 – Amend General Bylaws – Running Bamboo Control (Citizen Article)

Zoning Bylaw:

Article 9 – Amend Zoning Bylaw- Distance from Basement, Slab or Crawl Space and Groundwater.

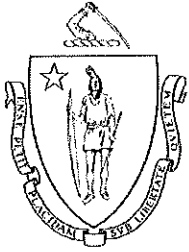
In accordance with Ch. 40 §32 of the Massachusetts General Laws, this amendment is hereby posted in a public place in each precinct of the Town for public inspection and on the Town's website. Additionally, due to Covid-19, this Bulletin will be posted in the Lexington Police Department foyer, 1575 Massachusetts Avenue. Amendments to the General Bylaws take effect on the date of posting. Zoning Bylaw amendments are deemed to have taken effect from the date voted by Town Meeting.

Documents pertaining to Zoning General Articles may be requested by email from the Planning Office (lkaufman@lexingtonma.gov) or the Town Clerk's Office (clerk@lexingtonma.gov).

Claims of invalidity by reason of any defect in the procedure of adoption or amendment of Zoning Bylaws may only be made within ninety days of this posting.

Attest:

Nathalie L. Rice
Town Clerk



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION
10 MECHANIC STREET, SUITE 301
WORCESTER, MA 01608

MAURA HEALEY
ATTORNEY GENERAL

(508) 792-7600
(508) 795-1991 fax
www.mass.gov/ago

June 11, 2021

Nathalie L. Rice, Town Clerk
Town of Lexington
1625 Mass Avenue
Lexington, MA 02420

RE: Lexington Special Town Meeting of October 21, 2020 - Case # 9970
Warrant Articles # 9, 10, 11, 12, 13, 14, 15, 16 and 18 (Zoning)
Warrant Articles # 3 and 5 (General)

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2021 JUN 14 PM 12:48
TOWN CLERK
LEXINGTON MA

Dear Ms. Rice:

Articles 5 and 9 - We approve Articles 5 and 9 from the Lexington October 21, 2020 Special Town Meeting. Our comment regarding Article 5 are provided below.¹

Article 5 - Under Article 5 the Town voted to prohibit "Running Bamboo" from encroaching on property other than the property in which it originated. As explained in more detail below, we approve Article 5 because we conclude that it is not in conflict with state law, including G.L. c. 128 § 27, and the state's Prohibited Plan list. See Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law). In this decision, we summarize the by-law amendment adopted under Article 5 and the Attorney General's standard of review of town by-laws, and then explain why, based on our standard of review, we approve Article 5.

During our review of Article 5, we received input from a Town resident urging our Office to disapprove Article 5 because it is unenforceable and because the courts have said property owners are not liable for plants in their yard that migrate, grow roots, overhang or drop leaves or seeds into a neighboring yard. This input has informed our review of the by-law and emphasized the importance of the issues at stake. However, as explained in more detail below, based on our standard of review and the Town's authority under the Home Rule Amendment and state law, we have determined that the asserted reasons urging the disapproval of Article 5 do not provide grounds for us to disapprove it.

¹ In a decision dated March 17, 2021 this Office approved Articles 3, 10, 11, 12, 13, 14, 15, 16, and 18 and placed Articles 5 and 9 on a 90-day extension.

TRUE COPY ATTEST

[Signature]
TOWN CLERK
LEXINGTON, MA

We emphasize that our approval of the by-law in no way implies any agreement or disagreement with the policy views that led to the passage of the by-law. The Attorney General's limited standard of review requires her to approve or disapprove by-laws based solely on their consistency with state law, not on any policy views she may have on the subject matter or the wisdom of the by-law. Amherst, 398 Mass. at 795-96, 798-99 (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law).

I. Summary of Article 5

Under Article 5, a citizen-petitioned article, the Town voted to amend the Town's general by-laws to add a new Chapter 131, "Running Bamboo Control" that prohibits "Running Bamboo," as defined in the by-law, from encroaching on property other than the property where the Running Bamboo was originally planted. The stated purpose of the by-law is to protect private and town-owned property and to protect "indigenous biodiversity" from Running Bamboo. Section 131-1 "Purpose and applicability." The by-law defines terms used in the by-law, including "Encroached or Encroachment," "Running Bamboo Owner," and "Running Bamboo" as follows:

ENCROACHED or ENCROACHMENT

The encroaching, spreading, invading, or intruding by Running Bamboo upon any property other than the property on which Running Bamboo was originally planted.

RUNNING BAMBOO

Any monopodial (running) tropical or semi-tropical bamboo grasses or bamboo species, and any other species of bamboo that is found to have encroached upon any property other than the property on which it was originally planted, including Town-owned property or a Town-owned right of way.

RUNNING BAMBOO OWNER

Any property owner, whether a person, firm, trust, corporation or other legal entity, at whose property Running Bamboo is located. Any property owner who provides satisfactory evidence to the Town Manager or their designee that the property owner did not plant the Running Bamboo on his or her property, and upon discovery of the Encroachment of Running Bamboo onto his or her property from an abutting property, informed the abutting property owner, by delivery of a written notice by certified mail within a year of the Encroachment being discovered, of an objection to the Encroachment of the Running Bamboo, and provides a copy of such written notice to the Town Manager within 5 days of mailing to the abutting property owner, shall not be considered a Running Bamboo Owner with respect to the abutting property so noticed, but may be considered a Running Bamboo Owner with respect to any other abutting properties, and shall be required to comply with the provisions of section 131-4 of this Chapter with respect to any such other abutting properties.

The by-law applies to new bamboo encroachment from a Running Bamboo Owner's property onto any private or Town-owned property or right of way after the effective date of the by-law and exempts any encroachments that occurred before the by-law takes effect. Section 131-3, "Applicability." Section 131-4, "Requirements," requires Running Bamboo owners to "confine Running Bamboo in a manner that will prevent the Running Bamboo from any encroachment onto

any other property or right of way.” Adequate barrier systems include: (1) a seamless barrier composed of high-density polypropylene or polyethylene or a metal barrier; (2) a fully enclosed above ground pot or planter; or (3) any barrier approved by the Town Manager. The by-law imposes a one hundred dollar fine per day for everyday the Running Bamboo is unconfined that may be enforced through G.L. c. 40, § 21D’s non-criminal disposition ticketing procedure.

II. Attorney General’s Standard of Review and General Preemption Principles

Our review of Article 5 is governed by G.L. c. 40, § 32. Pursuant to G.L. c. 40, § 32, the Attorney General has a “limited power of disapproval,” and “[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws.” Amherst, 398 Mass. at 795-96. The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 (“Neither we nor the Attorney General may comment on the wisdom of the town’s by-law.”) Rather, in order to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws. Id. at 796. “As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid.” Bloom v. Worcester, 363 Mass. 136, 154 (1973). Massachusetts has the “strongest type of home rule and municipal action is presumed to be valid.” Connors v. City of Boston, 430 Mass. 31, 35 (1999) (internal quotations and citations omitted). “The legislative intent to preclude local action must be clear.” Bloom, at 155.

Legislative intent to preclude local action can be “either express or inferred.” St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Dept. of Springfield, 462 Mass. 120, 125-26 (2012). Local action is precluded in essentially three instances, paralleling the three categories of federal preemption: (1) where the “Legislature has made an explicit indication of its intention in this respect”; (2) where “the State legislative purpose can[not] be achieved in the face of a local by-law on the same subject”; or (3) where “legislation on a subject is so comprehensive that an inference would be justified that the Legislature intended to preempt the field.” Wendell v. Attorney General, 394 Mass. 518, 524 (1985). “The existence of legislation on a subject, however, is not necessarily a bar to the enactment of local ordinances and by-laws exercising powers or functions with respect to the same subject[, if] the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject[.]” Bloom, 363 Mass. at 156; see Wendell, 394 Mass. at 527-28 (“It is not the comprehensiveness of legislation alone that makes local regulation inconsistent with a statute. . . . The question . . . is whether the local enactment will clearly frustrate a statutory purpose.”).

General Laws Chapter 40, Section 21 supplements a town’s Home Rule authority through its specific grant of authority to municipalities to adopt certain categories of local legislation, including “[f]or directing and managing their prudential affairs, preserving peace and good order...”. G.L. c. 40, § 21 (1). However, a municipality has no power to adopt a by-law that is “inconsistent with the constitution or laws enacted by the [Legislature]...” Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

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Juliana Ricci

TOWN CLERK
LEXINGTON, MA

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III. Article 5's Ban on the Encroachment of Running Bamboo Is Not Preempted by State Laws Regulating Invasive Species

Because Article 5 bans the encroachment of Running Bamboo, we specifically address Article 5's consistency with several state laws regulating invasive species, including G.L. c. 128, § 27 and the state's Prohibited Plant List. For the reasons provided below, we cannot conclude that Article 5's ban on Running Bamboo encroachment is in conflict with these laws.

General Laws Chapter 128, Section 27 authorizes the Director of the Division of Regulatory Services in the Department of Agricultural Resources ("DAR"), with the approval of the Commissioner of DAR, to prohibit, for such periods and under such conditions as he may impose, the importation of nursery stock, fruits, plants and parts thereof from outside the state when in the Director's opinion they are likely to be infested with insect pests or disease or are likely to act as a carrier.² In addition, according to DAR, the Massachusetts Invasive Plants Advisory Group ("Advisory Group") provides input to the DAR regarding the state's Prohibited Plant List that prohibits the importation, sale, and trade of plants determined to be invasive in Massachusetts. This prohibition also covers the purchase and distribution of certain plants and related activities, and includes all cultivars, varieties and hybrids of the species listed.³ According to DAR, bamboo species are not on the current list of prohibited plants in Massachusetts. DAR informs this Office that the Advisory Group may recommend adding Running Bamboo to the list of prohibited plants in the future. If Running Bamboo becomes subject to any prohibition adopted under G.L. c. 128, § 27, or is added to the state's Prohibited Plant, the by-law's prohibition and requirements would need to be reviewed by the Town, in consultation with Town Counsel, for consistency with such determinations.

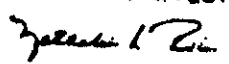
IV. Conclusion

The by-law's ban on Running Bamboo encroachments is within the Town's Home Rule and statutory authority. Moreover, we are unable to conclude that the by-law's ban on Running Bamboo encroachments is preempted by or otherwise conflicts with the state laws regulating invasive species and the state's Prohibited Plant List. On these grounds we approve Article 5.

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² See, e.g., 330 C.M.R. §9.00, *et seq.* that prohibits the transportation of gooseberry and currents, including black currants, in the state in order to prevent white pine blister rust, a disease affecting white pine trees.

³ More information about invasive and prohibited plants can be found on DAR's website: <https://www.mass.gov/massachusetts-prohibited-plant-list>

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TOWN CLERK
LEXINGTON, MA

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

MAURA HEALEY
ATTORNEY GENERAL

Kelli E. Gunagan

by: Kelli E. Gunagan, Assistant Attorney General
Municipal Law Unit
Office of the Attorney General
Ten Mechanic Street, Suite 301
Worcester, MA 01608
508-792-7600

cc: Town Counsel Mina Mikarious

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[Signature]

TOWN CLERK
LEXINGTON MA

TOWN CLERK'S CERTIFICATE

I, Nathalie L. Rice, Clerk of the Town of Lexington, Massachusetts, hereby certify that at the adjourned session of Special Town Meeting 2020-2 held on October 21, 2020, the following motion was adopted under **ARTICLE 5**.

ARTICLE 5: AMEND GENERAL BYLAWS – RUNNING BAMBOO CONTROL (Citizen Petition)

MOTION: That the Code of the Town of Lexington be amended by adding a new Chapter 131, Running Bamboo Control, as follows:

§ 131-1 Purpose and applicability.

1. The purpose and intent of this bylaw is to preserve and protect private and Town-owned property and Town-owned rights of way from the damaging spread of Running Bamboo and to protect indigenous biodiversity threatened by Running Bamboo.
2. Running Bamboo that encroaches beyond the Running Bamboo Owner's property or spreads rhizomes and new shoots pose a risk of substantial damage to the structures and land of abutting parcels. As Running Bamboo threatens to be destructive to the natural environment and to the enjoyment of public and private property including structures and paved surfaces in the Town of Lexington, the Town hereby declares it necessary to require the control of any existing Running Bamboo, and to prohibit the planting, replanting, transplanting, installation, or reinstallation of Running Bamboo on any property in the Town of Lexington subsequent to the effective date of this bylaw. .

§ 131-2 Definitions.

TOWN MANAGER

The Town Manager or their designee.

ENCROACHED or ENCROACHMENT

The encroaching, spreading, invading, or intruding by Running Bamboo upon any property other than the property on which Running Bamboo was originally planted.

RUNNING BAMBOO

Any monopodial (running) tropical or semi-tropical bamboo grasses or bamboo species, and any other species of bamboo that is found to have encroached upon any property other than the property on which it was originally planted, including Town-owned property or a Town-owned right of way.

RUNNING BAMBOO OWNER

Any property owner, whether a person, firm, trust, corporation or other legal entity, at whose property Running Bamboo is located. Any property owner who provides satisfactory evidence to the Town Manager or their designee that the property owner did not plant the Running Bamboo on his or her property, and upon discovery of the Encroachment of Running Bamboo onto his or her property from an abutting property, informed the abutting property owner, by delivery of a written notice by certified mail within a year of the Encroachment being discovered, of an objection to the Encroachment of the Running Bamboo, and provides a copy of such written notice to the Town Manager within 5 days of mailing to the abutting property owner, shall not be considered a Running Bamboo Owner with respect to the abutting property so noticed, but may be considered a Running Bamboo Owner with respect to any other abutting properties, and shall be required to comply with the provisions of section 131-4 of this Chapter with respect to any such other abutting properties.

The Town Manager may, but is not required to, consider the following as additional evidence to determine whether a property owner is a Running Bamboo Owner:

- a. Photographic evidence that the Running Bamboo began on the Running Bamboo Owner's property and encroached onto the neighboring property;
- b. The absence of an adequate Running Bamboo barrier system on the Running Bamboo Owner's property; and
- c. Any other evidence provided to the Town Manager demonstrating that the Running Bamboo was not planted on the owner's property.

§ 131-3 Applicability.

A. The provisions of this bylaw shall apply to any Running Bamboo Owner. The provisions of this bylaw shall not apply to any Running Bamboo that has already encroached from a Running Bamboo Owner's property onto any private or Town-owned property or right of way before (insert date the bylaw passes). Any new bamboo encroachments from a Running Bamboo Owner's property onto any private or Town-owned property or right of way on or after (insert date the bylaw passes) shall be subject to this bylaw.

B. The Town Manager or their designee may, but is not required to, consider the following as additional evidence to determine if a bamboo encroachment on any private or Town owned property or right of way occurred before or after the passage of this bylaw:

- a. Photographic evidence that the Running Bamboo encroachment onto the neighboring property occurred after the passage of this bylaw;
- b. The absence of an adequate Running Bamboo barrier system on the Running Bamboo Owner's property; and
- c. Any other evidence provided to the Town Manager or their designee demonstrating that the Running Bamboo encroachment onto the neighboring property occurred after the passage of this bylaw.

§ 131-4 Requirements.

A. All Running Bamboo Owners shall confine Running Bamboo in a manner that will prevent the Running Bamboo from any Encroachment onto any other property or right of way. The following shall constitute an adequate barrier system confining the Running Bamboo:

1. A seamless barrier composed of high density polypropylene, or polyethylene, or a metal barrier with sealed, overlapping and reinforced seams, or an impermeable joint free concrete barrier. The barrier must extend at least 36 inches below the ground surface, and the barrier must extend at least 2 inches above the ground surface for the entire length of the installation, and the installation must extend such that the possibility of flanking the barrier system is not possible;
2. The placement of the Running Bamboo in a fully enclosed above ground pot or planter; or
3. Any other adequate barrier system approved by the Town Manager or their designee.

B. Running Bamboo Owners with Running Bamboo within four feet of the boundary line of the Running Bamboo Owner's property must install and maintain a barrier preventing the spread of the Running Bamboo beyond the Running Bamboo Owner's property.

C. The Town Manager or their designee shall have the authority to promulgate regulations to accomplish any of the provisions of this bylaw.

D. All planting, replanting, transplanting, installation, or reinstallation of Running Bamboo in the Town of Lexington subsequent to the effective date of this bylaw is prohibited.

§ 131-5 Enforcement.

A. The Town Manager or their designee shall have the authority to enforce the provisions of this bylaw.

B. Any Running Bamboo Owner that is found to have violated the provisions of this bylaw may be subject to penalties pursuant to § 131-6 of this Chapter.

C. In the event Running Bamboo Encroaches onto Town-owned property or any Town-owned right of way, the Town Manager or their designee shall notify the Running Bamboo Owner in writing by certified mail, return receipt requested, of such Encroachment and/or other violation of this Chapter, which order shall:

1. Provide notice of the requirement to prevent Running Bamboo from Encroaching onto Town owned property or a Town owned right of way;
2. Specify the nature and location of the violation;
3. When applicable, order that the Running Bamboo Owner remove all portions of the Running Bamboo from the Town property or the Town owned right of way, and construct an adequate barrier system to prevent any further Encroachment; and

4. State that the failure to comply with the notice and order will lead to the Running Bamboo Owner being held liable to the Town for the cost of removal of the Encroachment, fines that may be imposed pursuant to § 131-6, and the Town's cost to install a barrier pursuant to the provisions of this bylaw.

D. The Running Bamboo Owner must obtain and comply with all applicable federal, state, and local permits, licenses and other requirements necessary to remove the Running Bamboo from any Town property or the Town right of way.

E. If the Running Bamboo Owner fails to remove the Running Bamboo as directed in the order sent pursuant to this Section, the Town may remove the Running Bamboo that has Encroached onto Town-owned property or onto a Town-owned right of way. The Town may also construct a barrier designed to contain the Running Bamboo and prevent further intrusion. The cost of the removal of the Running Bamboo and the installation of a barrier shall be charged to the Running Bamboo Owner. The Town shall not be liable to the Running Bamboo Owner for damages caused as a result of the Running Bamboo removal and the Running Bamboo Owner shall be liable for any and all damages to Town-owned property or rights of way or property owned by any third party, and expenses related thereto.

F. If the Town causes Running Bamboo to be removed from Town-owned property or from a Town-owned right of way, or causes a barrier to be installed, a statement of cost thereof shall be mailed to the Running Bamboo Owner by certified mail, return receipt requested with a demand for immediate payment to the Town for all such costs.

§ 131-6 **Penalty.**

Any Running Bamboo Owner that is in violation of this bylaw may be fined \$100.00 per day for each day that the Running Bamboo remains unconfined on the Running Bamboo Owner's property, or is in violation of any other provisions of this chapter. Any such penalty or penalties may be enforced through non-criminal disposition as provided by G.L. c. 40, § 21D.

§ 131-7 **Severability**

The provisions of this Chapter are severable. If any section, provision or portion of this bylaw is determined to be invalid by a court of competent jurisdiction, the remaining provisions of this bylaw shall continue to be valid.

and further, that the Code of the Town of Lexington be amended by adding the following in Chapter 1-6, Noncriminal Disposition in the appropriate numerical order:

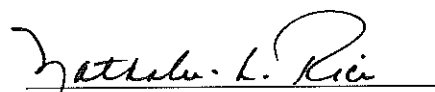
Chapter 131, Running Bamboo.


Fine schedule: \$100 per violation per day.

Declared Adopted with 150 in the affirmative, 6 in the negative.

A true copy.

Attest:


Nathalie L. Rice, Town Clerk

TRUE COPY ATTEST

TOWN CLERK
LEXINGTON, MA

TOWN CLERK'S CERTIFICATE

I, Nathalie L. Rice, Clerk of the Town of Lexington, Massachusetts, hereby certify that at the Special Town Meeting 2020-2 held on October 14, 2020, the following motion was adopted under **ARTICLE 9**.

ARTICLE 9: AMEND ZONING BYLAW – DISTANCE FROM BASEMENT, SLAB OR CRAWL SPACE AND GROUNDWATER

MOTION: That the Zoning Bylaw, Chapter 135 of the Code of the Town of Lexington, be amended by adding a new Section 4.5 as follows, and further that non-substantive changes to the numbering of this bylaw be permitted in order that it be in compliance with the numbering format of the Code of the Town of Lexington:

4.5.1 PURPOSE.

The purposes of this section are to preserve and protect groundwater; to maintain and enhance the public safety, environment, health, and general welfare by establishing minimum requirements; and to establish procedures to control the adverse effects of building basement floors nearer than two (2) feet from the Estimated Seasonal High Groundwater Table (ESHGWT), including basement flooding, pumping and discharge of groundwater to neighboring properties, discharging groundwater to the public way, and illicit connections to the Town's sewer and stormwater connections.

4.5.2 DEFINITIONS.

Estimated Seasonal High Groundwater Table (ESHGWT): The estimated highest level to a zone of saturation in the soil in most years under normal wet season, as determined by a registered professional engineer, a qualified soil scientist or licensed soil evaluator.

4.5.3 APPLICABILITY.

The requirement of this Section 4.5 shall apply to:

1. A new dwelling; or
2. Additions to an existing dwelling that increases a building footprint by more than 1,000 square feet.

4.5.4 CONDITIONS AND REQUIREMENTS.

The vertical distance between the finished basement floor of any dwelling shall not be less than two (2) feet above the ESHGWT. Permission for a vertical distance less than two (2) feet above the ESHGWT may be granted if the applicant provides sufficient evidence that a

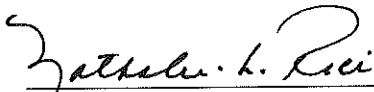
proposed lesser vertical distance will not impact the structure being proposed in a manner contrary to the purposes of this Section 4.5, any other structures or constructed facilities, or the functions of the natural groundwater system (such as base flow maintenance) and if all of the following conditions are met:

1. Detailed engineering plans, certified by a Registered Professional Engineer showing a foundation and perimeter drain management system and roof stormwater management system(s) that will mitigate and control groundwater discharge and stormwater runoff, are provided;
2. The provided foundation and perimeter drain discharge management system and roof stormwater management system plans have been reviewed by the Building, Conservation, Health and Engineering Departments and comments adequately addressed;
3. Roof drains and downspouts connect to a stormwater management system designed by a Registered Professional Engineer; and
4. The applicant has agreed to pay the fee for consulting services to perform engineering review pursuant to the provisions of MGL Chapter 44, Section 53G.

Declared Adopted by the necessary two-thirds with 154 in the affirmative, 5 in the negative.

A true copy.

Attest:


Nathalie L. Rice, Town Clerk